

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-CV-00329-GKF(SAJ)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF  
ITS MOTION FOR PROTECTIVE ORDER WITH RESPECT  
TO DEFENDANT SIMMONS FOODS, INC.'S NOTICE OF DEPOSITION  
OF OKLAHOMA ATTORNEY GENERAL W. A. DREW EDMONDSON**

COMES NOW the Plaintiff, the State of Oklahoma, *ex rel.* W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State"), and respectfully submits this reply in further support of its "Motion for Protective Order with Respect to Defendant Simmons Foods, Inc.'s Notice of Deposition of Oklahoma Attorney General W.A. Drew Edmondson." [DKT #1033]

Defendant Simmons Foods' assertion that Attorney General Edmondson is acting as a plaintiff in the case is contrary to both the law and the facts. Attorney General Edmondson is the lead attorney for the State in this action. Depositions of counsel are strongly disfavored, and Defendant Simmons Foods has failed to establish any of the exceptional circumstances required to justify Attorney General Edmondson's deposition. Additionally, Defendant Simmons Foods' contention that the "top government official" rule is limited to only federal officials is not supported in the law. Depositions of top government officials are disfavored, and here too

Defendant Simmons Foods has failed to establish any of the compelling reasons required to justify Attorney General Edmondson's deposition. Accordingly, the State's Motion for Protective Order prohibiting the deposition of Attorney General Edmondson must be granted.

## **I. Argument**

### **A. Attorney General Edmondson is not a plaintiff in this case; rather, he is the lead attorney for the State**

Defendant Simmons Foods asserts, without citing to any legal authority, that Attorney General Edmondson is a plaintiff in this case. *See* Simmons Foods' Response, p. 7. In making this assertion Defendant Simmons Foods simply ignores the manner in which the case was brought: "State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma . . . ." *See* DKT #2. In its Motion for Protective Order, pp. 2-3, the State has set forth legal authority -- uncontested by Defendant Simmons Foods in its response -- that when a case is brought "ex rel." the attorney general, the State is the real party in interest and plaintiff. Indeed, the entire basis of Defendant Simmons Foods' argument that Attorney General Edmondson is a plaintiff in the case appears to rest on the fact that he is the ultimate decision-maker for the State regarding issues in the case, including issues of whether to settle or not. *See* Simmons Foods' Response, p. 7. Defendant Simmons Foods fails to understand Oklahoma law. Under Oklahoma law, "[t]he Attorney General has authority to bring lawsuits by virtue of 74 O.S. 1971 § 18b and to assume and control the prosecution thereof in the state's best interest. It must logically follow that he has authority to compromise and dismiss the suit." *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818 (Okla. 1973). That Attorney General Edmondson has this authority does not change the fact that he is the lead lawyer in this case for the State. Nor does it make him a plaintiff.

Defendant Simmons Foods also asserts that Attorney General Edmondson is not acting as a lawyer in the case. *See* Simmons Foods' Response, p. 7.<sup>1</sup> This assertion is simply contrary to all of the facts: Attorney General Edmondson (1) is the lead attorney for the State in the case, *see* 74 Okla. Stat. § 18b & *Derryberry*, 516 P.2d at 818, (2) is listed first on the civil cover sheet as attorney for the State, *see* DKT #1, (3) has filed an entry of appearance as attorney for the State, *see* DKT #3,<sup>2</sup> and (4) has argued in Court as an attorney for the State in this case, *see* DKT #244.

**B. Defendant Simmons Foods has not made the showing of exceptional circumstances required to justify the deposition of Attorney General Edmondson**

Despite Defendant Simmons Foods' protests to the contrary, the courts of this circuit do use the *Shelton* factors to evaluate the propriety of requests to depose opposing counsel. *See Boughton v. Cotter Corporation*, 65 F.3d 823, 830 (10th Cir. 1995) ("the trial court at least has the discretion under Rule 26(c) to issue a protective order against the deposition of opposing counsel when any one or more of the three *Shelton* criteria for deposition listed above are not met") (emphasis in original); *Thiessen v. General Electric Capital Corporation*, 267 F.3d 1095,

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<sup>1</sup> Defendant Simmons Foods' efforts to analogize a deposition of Attorney General Edmondson to a deposition of Mr. Randy Allen fall flat. *See* Simmons Foods' Response, pp. 3 & 8-10. In contrast to Mr. Allen, a non-attorney and a fact witness, when Attorney General Edmondson speaks on matters pertaining to this case, he is speaking as the lead attorney for the State in this case and as attorney general. *See, e.g., Hultman v. Blumenthal*, 787 A.2d 666, 674 (Conn. App. 2002) ("One of the attorney general's implied duties is . . . to give updates to the public concerning the cases handled by his office. As an elected constitutional official, the attorney general has a duty to inform the public of the matters occurring in his office. As an elected constitutional official, his duty to the public may include expressions of his opinion about civil legal matters over which he has general supervision") (citation omitted); *Gold Seal Chinchillas, Inc. v. State of Washington*, 420 P.2d 698, 701 (Wash. 1966) (" . . . the Attorney General, as an elected officer of cabinet rank in state government, has an implicit duty by virtue of his position to inform the people of the state of Washington of actions taken in his official capacity").

<sup>2</sup> Courts have found that even where an attorney is not counsel of record in a case, the attorney may still be viewed as "opposing counsel." *See, e.g., Epling v. UCB Films, Inc.*, 204 F.R.D. 691, 693-94 (D. Kan. 2001).

1112 fn 15 (10th Cir. 2001) ("*Shelton* was adopted by this court in *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir. 1995)"); *In re Muskogee Environmental Conservation Company*, 221 B.R. 526, 529 (Bankr. N.D. Okla. 1998) ("[T]he taking of the deposition of opposing counsel should only be allowed where the party seeking to take the deposition has established [the *Shelton* criteria]"); *Simmons Foods v. Willis*, 191 F.R.D. 625, 630 (D. Kan. 2000) (applying *Shelton* criteria). Moreover, it is important to note that the *Shelton* factors merely provide the minimum showing that is required in order to take the deposition of an opposing counsel.<sup>3</sup> As explained in *Simmons Foods*, "the *Boughton* court declined to hold that a court must permit parties to depose opposing counsel upon a showing that the three [*Shelton*] factors are satisfied. As interpreted by this Court, *Boughton* dictates that, even when a party satisfies all three of the *Shelton* factors, courts may prohibit such depositions 'in other appropriate situations.'" 191 F.R.D. at 630.

With respect to the first of the *Shelton* factors -- that the only means of obtaining information is through deposition of opposing counsel -- Defendant Simmons Foods utterly fails to carry its burden. Indeed, Defendant Simmons Foods never clearly sets out precisely what information it seeks from Attorney General Edmondson. Rather, Defendant Simmons Foods' stated grounds for the sought-after deposition are that "Simmons wants to ask questions of a representative of Plaintiffs [sic]," and that "Simmons wants to ask General Edmondson what he knows about various topics involved in the lawsuit." *See Simmons Foods' Response*, p. 2.<sup>4</sup> As

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<sup>3</sup> Contrary to Defendant Simmons Foods' suggestion, *see Simmons Foods' Response*, p. 11, the burden of establishing that all three of the *Shelton* factors are satisfied is on the party seeking the deposition. *See Simmons Foods*, 191 F.R.D. at 630.

<sup>4</sup> Defendant Simmons Foods also later states that "only General Edmondson can speak concerning his motivation and reasoning to work with Defendants." *See Simmons Foods' Response*, p. 15. As noted in *United States v. Northside Realty Associates*, 324 F.Supp. 287, 293

to this first ground, the appropriate approach for Defendant Simmons Foods is to serve a 30(b)(6) deposition notice,<sup>5</sup> to identify appropriate persons listed on the State's Rule 26(a) disclosure, or to serve a written discovery request. As to the second ground, Defendant Simmons Foods' amorphous reason falls far short of that necessary to justify the deposition of the State's lead attorney.

With respect to the second of the *Shelton* factors -- that the information is relevant and non-privileged -- given that Defendant Simmons Foods has not identified with any specificity the information it seeks in this deposition, it is impossible to know if the information would be relevant and non-privileged. All that one can know is that in light of the vagueness and breadth of Defendant Simmons Foods' stated grounds for the deposition, the sought-after deposition has all the hallmarks of an improper fishing expedition. If Defendant Simmons truly has specific areas of legitimate non-privileged inquiry, it can do as Defendant Tyson Foods, Inc. did and serve written discovery. See Defendant Tyson Foods, Inc. November 2, 2006 Requests for Production of Documents to Plaintiffs (request for information supporting statement by Attorney General Edmondson). The State can then evaluate the discovery for relevancy, privilege, etc. and provide appropriate responses and objections.

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(N.D. Ga. 1971), "[i]t has been recognized that a member of the Cabinet or the head of a large executive department should not be called upon to give his deposition if such deposition is taken in order to probe the mind of the official to determine why he exercised his discretion as he did in regard to a particular matter." (Citations omitted.) This prohibition is doubly warranted where the official is the lead attorney in a lawsuit, since such inquiry would clearly and impermissibly invade the attorney's thought processes which are protected by the work product doctrine. See Fed. R. Civ. P. 26(b)(3).

<sup>5</sup> Defendant Simmons Foods asks, "Who does one depose to learn more?" Fed. R. Civ. P. 30(b)(6) serves precisely this purpose.

With respect to the third of the *Shelton* factors -- that the information is crucial to the preparation of the case -- Defendant Simmons Foods asserts that "Plaintiffs [sic] have sued Simmons and others . . . but without (so far) disclosing to defendants any detailed factual basis for the lawsuit." *See* Simmons Foods' Response, p. 16. Not only is this assertion lacking in any foundation,<sup>6</sup> but also Defendant Simmons Foods fails to explain precisely what non-privileged, relevant information in the sole possession of Attorney General Edmondson is crucial to the preparation of Defendant Simmons Foods' case.

Simply put, depositions of opposing counsel are strongly disfavored. *See, e.g., In re Muskogee Environmental Conservation Company*, 221 B.R. at 532; *Simmons Foods*, 191 F.R.D. at 630. Defendant Simmons Foods, however, has turned this principle on its head, asserting that "[Attorney General Edmondson] is an excellent candidate with which [sic] to start." *See* Simmons Foods' Response, p. 16. As demonstrated in its Motion for Protective Order and above, depositions of opposing counsel are to be allowed, if at all, as a last resort, when there are no alternatives to securing the necessary information. Defendant Simmons Foods has failed to satisfy any of the *Shelton* criteria. The State's Motion for Protective Order should therefore be granted.

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<sup>6</sup> *See, generally*, Plaintiff State of Oklahoma's Response in Opposition to "Tyson Defendants' Motion to Compel" [DKT #1036]. The State to date (1) has produced more than 300 boxes of documents responsive to the Poultry Integrator Defendants' discovery requests (such documents being in addition to its earlier voluminous voluntary productions and identification of data available on the internet sites of state and federal agencies), (2) has provided extensive indices of the documents being produced, (3) has responded to more than 234 requests for production; (4) has responded to more than 74 interrogatories, (5) has provided a 72-page Rule 26(a) disclosure (which it subsequently supplemented), and (6) turned over approximately 13 boxes of sampling documents and approximately 50 gigabytes of electronic sampling data pursuant to the Court's January 5, 2007 Order. Mere repetition by Defendant Simmons Foods of the unfounded assertion that the Poultry Integrator Defendants do not know the factual basis for the State's lawsuit does not make it true.

**C. Defendant Simmons Foods is wrong that the "top government official" rule is limited to federal officials**

"Heads of government agencies are not normally subject to deposition." *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). Defendant Simmons Foods suggests that this rule disfavoring the deposition of top government officials is restricted in its application to only federal officials. *See* Simmons Foods' Response, pp. 16-17. Defendant Simmons Foods is wrong. This rule applies to state officials as well. For instance, as recently as last year, a federal district court applied this rule to a state attorney general. In *California v. United States*, 2006 WL 2621647, \*1 (N.D. Cal. Sept. 12, 2006), the court disallowed the deposition of California Attorney General Bill Lockyer. In that case, the parties seeking the deposition of Attorney General Lockyer argued that he had "stepped into the role of a witness" by submitting a sworn declaration on the merits in support of the plaintiffs' motion for summary judgment and had been identified by the plaintiffs as a knowledgeable witness as to the merits of their claims. *Id.* Despite these arguments, the court found that the deposition of Attorney General Lockyer was "not essential." *Id.* The court went on to explain that "[d]efendants have failed to demonstrate why they cannot seek the information they desire by propounding additional interrogatories or noticing other witnesses for deposition." *Id.*

Despite now having had the opportunity to do so in its response, Defendant Simmons Foods has utterly failed to demonstrate "that the information to be gained from such a deposition is not available from any other source," *Church of Scientology of Boston v. Internal Revenue Service*, 138 F.R.D. 9, 12 (D. Mass. 1990), or that such a deposition "is essential to prevent prejudice or injustice to the party who would require it." *Wirtz v. Local 30, International Union of Operating Engineers*, 34 F.R.D. 13, 14 (S.D.N.Y. 1963). Accordingly, this Court should also grant the State's Motion for Protective Order on the basis of the "top government official" rule.

## II. Conclusion

WHEREFORE, premises considered, the State's motion for a protective order prohibiting the deposition of Attorney General Edmondson should be granted.

Respectfully Submitted,

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